Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

MINNEAPOLIS TAXI OWNERS COALITION, INC.,
Petitioner,

vs.

CITY OF MINNEAPOLIS,
Respondent,

and

A NEW STAR LIMOUSINE AND TAXI SERVICE, INC.,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I: Is the value of fully–transferable and publically-marketed City of Minneapolis Taxicab licenses, whether determined by sales price or by purchase price, apart from the nominal license fee set by the City, a form of constitutionally–protected property whose taking by the City of Minneapolis ought to be compensated?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

The Minneapolis Taxi Owners Coalition, Inc., is a Minnesota corporation which has no parent corporation and has issued no stock. No publically–held company has any ownership interest in this corporation.

A New Star Limousine and Taxi Service, Inc., is also a Minnesota corporation having no parent corporation. No publically–held corporation owns 10% or more of the stock of A New Star.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 572 F.3d 502 (8th Cir. 2009). See Appendix C. The unreported Order denying the Petition for Rehearing en Banc appears at Appendix D. The opinion of the United States District Court appears at Appendix B; again said order is not reported. The unreported Magistrate's Report & Recommendation appears at Appendix A.

STATEMENT OF JURISDICTION

This petition seeks to review a decision of the United States Court of Appeals for the Eighth Circuit which is dated July 14, 2009. The petition here is being filed within 90 days of the Court of Appeals' entry of its decision denying the timely–filed Petition for Rehearing en Banc which Order is dated August 17, 2009. A copy of the order denying the Petition for Rehearing is attached at Appendix D. The United States Supreme Court's jurisdiction here is properly invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, "No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

This Amendment to the Constitution of the United States was raised by the Minneapolis Taxi Owners Coalition, Inc., in the Verified Complaint in this matter.

STATEMENT OF THE CASE

Prior to October 1, 1995, the City of Minneapolis had issued 273 taxicab licenses. Each license was renewable and transferrable for value from one person or entity to another. (Verified Complaint ¶ 8, 11). These transferrable licenses were being sold between willing sellers and willing buyers in a range between $19,000 and $24,000. *Id.* at ¶ 14. Officials for the City of Minneapolis have publically acknowledged that these fully-transferrable taxicab licenses were being sold for approximately $25,000. *Id.* at ¶ 15.

In the majority of instances, one could not participate in the City of Minneapolis taxicab–for– hire market without holding or buying one of these limited fully–transferrable licenses.

Transfers and sales of each of these licenses required the formal approval of the City Council of the

City of Minneapolis. The City had knowledge of the value of the sale of and transfer of each fully-transferrable licenses from 1995 to the present. *Id.* at ¶ 18. The actual license fee payable annually to the City amounted only to $500 while the fair market value of these same licenses sold to willing buyers ranged into the low to mid–$20,000.

The City of Minneapolis amended its ordinance to lift the cap on the number of available taxicab licenses such that in five years' time, unlimited taxicab licenses would be available. The public market for the sale of the fully–transferable licenses collapsed. City officials acknowledged in the hearings prior to the enactment of the ordinances that increasing the number of available taxicab licenses would result in "the destruction of all investment value paid by these existing licensees [when] more licenses should be issued." Verified Complaint ¶. At this time, these transferable licenses simply cannot be sold as there are no willing buyers. Verified Complaint, ¶ 32.

The Minneapolis Taxi Owners Coalition sued in Hennepin County District Court. Other issues raised in the litigation below related to fuel efficiency requirements and demands for wheelchair accessible taxicabs. The City removed the matter to Federal District Court.

A New Star Limousine and Taxi Service then intervened, represented by the Institute for Justice. A New Star motioned to dismiss the case based on failure to state a claim.

The Magistrate Judge issued an opinion recommending that the case be dismissed, and the District Court Judge, adopted this decision on December 18, 2007. Appeal to the Eight Circuit Court of Appeals followed. The Notice of Appeal was filed on Jauary 16, 2008.

The Eighth Circuit affirmed the District Court's decision on July 14, 2009. The Minneapolis Taxi Owners Coalition, Inc., filed a Petition for Rehearing en Banc on July 24, 2009. The Eighth Circuit denied the petition in its Order dated August 17, 2009.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit did not account for the difference between an annual taxicab license fee and the private purchase price or fair market value of a fully–transferrable taxicab license.

The Eighth Circuit held that the fully–transferrable City of Minneapolis taxicab licenses were not to be considered a form of constitutionally–protected property. This holding is mistaken. The fair market value of fully–transferable City of Minneapolis taxicab licenses, a property right separate from the nominal license fee set by the City, stands as a form of constitutionally–protected property whose taking ought to be compensated.

The fair–market value of these transferrable taxicab licenses is not speculative in any sense. The fair market value of each individual taxicab license

marketed by its owner to another person has been approved and acknowledged by the City of Minneapolis in that every single transfer of a transferable taxicab license must be affirmed by a vote of the Minneapolis City Council.

The actual City of Minneapolis taxicab license fee is only $500; this fee is constant, a fee to be paid by those who operate taxicabs with a fully– transferrable license and those who operate taxicabs with licenses which may not be sold or transferred.

While the annual taxicab license fee is modest, the fair market value of these same fully– transferrable licenses falls within an average range of $20,000. The actual annual license fee represents a tiny fraction of the fair market value of the transferable taxicab license; the $500 license fee bears no relationship to the purchase price or the fair market value of a transferrable taxicab license.

The District Court and the Court of Appeals suggest that the license still allows its holder to participate in the taxicab business for hire. This is unquestionably true. What is also true is that the entire purchase price or the entire fair market value of each transferrable taxicab license has vanished in a legislative amendment to the ordinances of the City of Minneapolis. The loss of an entire stick in the bundle of property rights should not be permitted.

Babbitt v. Youpee, 519 U.S. 234 (1997), holds that requiring the uncompensated escheat of the value

of even modest parcels of land is unconstitutional under the Fifth Amendment's Takings Clause. In the present case, the holders of the fully–transferrable taxicab licenses have nothing of value to sell since City of Minneapolis taxicab licenses are (or will soon be) available to the entire community on the simple payment of a $500 license fee.

Supreme Court Justice Holmes observed that "if a regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Courts have historically used a three–tiered analysis in which the Court evaluates (1) the character of the governmental action, (2) the economic impact of the regulation, and (3) the extent to which that action interfered with the owner's legitimate, investment-backed expectations. *Penn Central v. City of New York*, 438 U.S. 104, 124 (1978).

Here, a city government has completely destroyed a market which the city itself had promoted. The character of the government action is especially onerous since the City of Minneapolis and its taxicab drivers had been operating under the same legislative system for years. Finally, the City has submitted no response to the claims raised by the fully– transferrable licenses that their entire investment has been unexpectedly taken from them, other than indifference.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 334 (2002); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); and, *Dolan v. City of Tigard*, 512 U.S. 374, 385

(1994) established the a form of the 'doctrine of unconstitutional conditions,' which provides that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545-48 (2005).

In the present case, the loss of the fair market value of a fully–transferrable taxicab license and the $500 annual license fee are not connected. One could pay the $500 annual license fee and operate a taxicab in the City of Minneapolis in either case, with or without holding a fully–transferrable taxicab license. There is no discretionary benefit to taxicab licenses related even tangentially to the complete loss of the value of their fully-transferrable taxicab licenses. The City of Minneapolis shattered any connection between operating a taxicab and the possession of a fully–transferrable taxicab license. It follows that the City of Minneapolis has taken the entire value of the fully– transferrable taxicab license; and Minneapolis should compensate the owners of these transferrable licenses.

II. Case law remains inconsistent on whether a taxicab license is property whose loss is compensable under the Fifth Amendment.

One major appellate State court case has directly analyzed an assignable taxicab license as a constitutionally– protected property interest: *Boonstra*

v. City of Chicago, 574 N.E.2d 387 (Ill. Ct. App. 1991)..

In *Boonstra*, the Illinois Court of Appeals stated:

> [T]he facts under which the taxicab license in the present case was issued and assigned support the conclusion that the taxicab license and its assignability is a constitutionally protected property interest. Here, the City of Chicago expressly limited the number of taxicab licenses to be issued and expressly provided that they were assignable. Also, the City of Chicago provided standard forms and applications for the assignment of the taxicab licenses, and the assignment forms and applications had to be filed with and approved by the City of Chicago. The City of Chicago never rejected an application for assignment. Under the circumstances, for more than 20 years, the City of Chicago, pursuant to its ordinance, plainly fostered and participated in the assignment of the taxicab licenses. In effect, the City of Chicago created for its citizens a public market place for the assignment of its taxicab licenses. Thus, the taxicab licenses in reality became more than just mere personal permits granted by a governmental body to a person to pursue some occupation or to carry on some business subject to regulation under the police power. In a

> functional sense, the taxicab licenses embraced the essence of property in that they were securely and durably owned and marketable.
>
> Plainly, the characteristics which the City of Chicago, itself, gave to its taxicab licenses and their assignability are all consistent with an individual entitlement which cannot be removed except for cause or with just compensation.

Id. at 386-87 (citations omitted).

The Eighth Circuit appellate panel declined to follow *Boonstra* despite the congruity of this case with this present case: The owners of City of Minneapolis taxi licenses have a property interest in their fully-transferable licenses, or as *Boonstra* observes, their "securely and durably owned and marketable" licenses. The owners had an exclusive right to these licenses; the licenses might only be taken away for cause; and they are fully transferrable. It is clear that the City of Minneapolis itself had created and countenanced a private market for the assignment and sale of these taxicab licenses. The City decided to willfully terminate this private market with the knowledge that the persons who had participated in its market for years would lose the entire value of their investment in purchasing a taxicab license. See also, *Flower Cab Co. v. Petitte*, 658 F.Supp. 1170, 1176 (N.D. Ill. 1987), a case using *Boonstra*, *op.cit.*, as the defining case in its analysis.

Minnesota law itself instructs that certain business licenses which are assignable and transferable should be "construed as a property right rather than a privilege." *State v. Saugen*, 169 N.W.2d 37 (Minn. 1969). State law often establishes property rights. The defining characteristics are whether the citizen can "exclude, use, transfer, or dispose of the property," *United States v. General Motors Corp.*, 323 U.S. 33, 378 (1945).

In *Saugen*, the Minnesota Supreme Court concluded that the bar owner had a compensable property interest in his liquor license. The fee for the liquor license was not at issue. Saugen wanted to be reimbursed for the fair–market value of a commercial business which had lost its market value.

The Minnesota Supreme Court noted that:

> [Saugen] operated a liquor establishment under the authority of a valid and unrevoked license issued by the city of Minneapolis. . . . The number of licenses which can be issued is limited. . . . Upon the licensee's death, the decedent's personal representative might operate under the license by filing his appointment and a bond. . . . The license was transferable to another person with the consent of the city counsel. . . . Revocation of an issued license would be in order only upon a violation of

> ordinances and law relative to such license, . . .

Saugen at 40-41.

The factual congruence between the liquor license holder in *Saugen* and Appellant's present members is striking: Each holder of a transferrable City of Minneapolis taxicab license operated the holder's taxicab under a valid and unrevoked license issued by the City of Minneapolis within a system having a limited number of licenses. The consent of the Minneapolis City Council affirmed each transfer. Revocation of a transferrable taxicab license would be in order only where the taxicab license holder had violated the law.

The Eighth Circuit's use of the expression, the "going–concern value of the [taxicab business]" shifts the concern of the taxicab license holders from the substantial economic loss of the fair market value of their transferrable licenses to the mere business value of operating a taxicab business, which is another concern. The taxicab license holders can still operate their taxicabs and so participate in the taxicab–for–hire business, but the same taxicab license holders have been stripped of a substantial stick in the bundle of property rights.

The Eighth Circuit's statement that the market value of the license is "at best, an incomplete and imperfect assessment of that on–going value" is negated by the proof submitted by the taxicab license holders to

substantiate the fair–market value of these transferrable licenses. The City of Minneapolis acknowledged these same values as accurate.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted.

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APPENDIX A: Magistrate's decision.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 07-1789
Minneapolis Taxi Owners Coalition, Inc.,
Plaintiff,
v.
City of Minneapolis,
Defendant
and
A New Star Limousine and Taxi Service, Inc.
Intervenor.

REPORT AND RECOMMENDATION

Lawrence H. Crosby for Plaintiff.
Timothy S. Skarda for Defendant.
Scott J. Bullock for Intervenor.

THIS MATTER came before the undersigned United States Magistrate Judge on August 31, 2007, on Intervenor's Motion to Dismiss [#25], and Intervenor's Supplemental Motion to Dismiss Count Five [#30]. The matter was referred to the undersigned for Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule 72.1. For the reasons which follow, this Court recommends Intervenor's Motion be **GRANTED**.

I. ASSUMED FACTS

The Minneapolis Taxi Owners' Coalition ("the Coalition") is an organization of individuals who own

taxicab vehicle licenses issued prior to October 1, 1995 by the City of Minneapolis ("the City"). (Compl. ¶ 3.) The City issued 273 licenses before October 1, 1995, all of which are transferable in that they can be bought and sold. (Compl. ¶¶ 8-9) Since October 1, 1995, the City has issued 343 non-transferable licenses. (Compl. Ex. C at 1.) The Coalition members own about 75 transferable licenses. (Compl. ¶ 12.) In 2006, the City amended its taxi ordinance to remove the cap on the number of taxi licenses issued. Minneapolis, Minn., Code of Ordinances, title 13, ch. 341, sec. 300. The amendment provides that the City will issue 45 additional taxi licenses every year until 2011 when it will remove the cap altogether. *Id.* Until the City of Minneapolis ("the City") amended the ordinance, the transferable licenses had a market value ranging between $18,000 and $24,000. (Saleem Aff. ¶ 4, Strouts Aff. ¶ 5.) Now the transferable licenses are almost impossible to sell because entrants to the market can get licenses from the City for a relatively nominal fee. (Compl. ¶ 32.) Prior to the ordinance amendment, the City held yearly "public convenience and necessity hearings" where the City Council would determine, based on a number of factors, whether it would issue new taxi licenses that year. (Compl. Ex. E, a copy of the pre-existing ordinance that includes the changes made to it in 2006.) The factors considered by the City Council at the public convenience and necessity hearings were:

> a. The level and quality of service being provided by existing taxicab operators;
> b. Whether additional competition would improve the level of and the quality

> of service or the degree of innovation in delivery of services;
> c. The impact upon safety of vehicular and pedestrian traffic;
> d. The impact upon traffic congestion and pollution;
> e. The available taxicab stand capacity;
> f. The public demand and need for service;
> g. The impact on existing operations; and
> h. Such other relevant factors as the city council may deem relevant.

(*See* Compl. Ex. E at repealed sec. 341.270(a))

In addition to removing the cap on taxi licenses, the City made additional changes to the taxi ordinance. The new ordinance also requires that new service companies have a fleet size of at least 15 vehicles, ten percent of which must be wheelchair accessible and ten percent of which must be
fuel efficient or run on alternative fuel. Minneapolis, Minn., Code of Ordinances, title 13, ch. 341, sec. 300(b). Service companies in existence on or before November 1, 2006 must also meet these standards by December 31, 2008. *Id.*

In Count One, Plaintiff alleges that the City deprived its members of their business licenses without due process of law and their "property interests" in their licenses were taken without just compensation. (Compl. ¶¶ 42-63.) In Count Two, Plaintiff alleges that the City deprived the Coalition members of their property

interest in the value of the licenses on the secondary market without just compensation. (Compl. ¶¶ 64-73.)

In Count Three, Plaintiff alleges that the wheelchair accessibility requirements constitute an "unconstitutional exaction." (Compl. ¶¶ 74-86.).

Count Four alleges that the City's decision to change the law resulted in a reduction in the value of the licenses to nothing on the secondary market, an outcome that constitutes a regulatory taking. (Compl. ¶¶ 87-96.)

Count Five alleges that the Plaintiff's members were denied Equal Protection of the laws because the City amended the ordinance, in part, to better serve the Hispanic community.
(Compl. ¶¶ 97-108.)

II. STANDARD OF REVIEW

Intervenors move to dismiss the Complaint for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). In analyzing the adequacy of a complaint under Rule 12(b)(6), the Court must construe the complaint liberally and afford the plaintiff all reasonable inferences to be drawn from those facts. *See Turner v. Holbrook*, 278 F.3d 754, 757 (8th Cir. 2002). For the purpose of a motion to dismiss, facts in the complaint are assumed to be true. *In re Navarre Corp. Sec. Litig.*, 299 F.3d 735, 738 (8th Cir.2002).

Nevertheless, dismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in their legal premises and deigned to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity. *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989). To avoid dismissal, a complaint must allege facts sufficient to state a claim as a matter of law and not merely legal conclusions. *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir.1998).

A plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief about the speculative level on the assumption that all the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (U.S. 2007).

III. LEGAL ANALYSIS

A. License holders do not have a protectable property interest in the value of their licenses on the secondary market (Count Two and Four).

The Supreme Court has "dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978) (citing *United States v. Willow River Power Co.*, 324 U.S. 499 (1945) (interest in high-water

level of river for runoff for tailwaters to maintain power head is not property); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (no property interest can exist in navigable waters)). In *Willow River*, the Supreme Court held that "not all economic interests are 'property rights'; only those economic advantages are 'rights' which [are recognized by law], and only when they are so recognized may courts compel others to forbear from interfering with them or compensate for their invasion." 324 U.S. at 502.

See also Jackson Sawmill Co., Inc. v. United States, 580 F.2d 302, 308 (8th Cir. 1978) (owners of municipal bonds used to fund construction of a bridge had no constitutionally recognizable property right in a monopoly over traffic going between St. Louis and East St. Louis); *Rogers Truck Line, Inc. v. United States*, 14 Cl. Ct. 108, 112 (1987) (owners of special trucking licenses did not have a constitutionally protected property interest in the value of their licenses on the secondary market).

In *Penn Central*, the Supreme Court explained that there must be a limit on compensation to individuals whose property has diminished in value by virtue of government action: "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." 438 U.S. at 124 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

In *Jackson Sawmill*, the plaintiffs purchased municipal bonds from the City of East St. Louis, Illinois, to fund the construction of the Martin Luther King Bridge between that city and St. Louis, Missouri. *Id.* at 304. The trust agreement for the bonds provided they would be paid for using money raised from tolls and other bridge revenues. *Id.* at 305. It also stipulated that the City of East St. Louis would not permit construction of a bridge within the city limits that would divert traffic and diminish revenues. *Id.* Nevertheless, some years later, the City of East St. Louis, inconjunction with a number of other governmental entities, agreed to build a new bridge which resulted in traffic being diverted from the Martin Luther King Bridge and caused the City of East St. Louis to default on the bridge bonds. *Id.* The bondholders sued, alleging, *inter alia*, that they had been deprived of their property interest in what the court called "a monopoly over traffic traveling between St. Louis and East St. Louis." *Id.* at 307. In denying the plaintiff's claim that they had such a property interest, the court reasoned:

> Under no interpretation of the facts, no matter how we strain to be favorable to their claim, do appellants have anything more than two covenants issued by the City of East St. Louis. The covenants entitle them to an exclusive right to revenues from the King Bridge . . . *Id.* This property interest in the bonds did not give rise to a constitutionally recognizable property interest in a monopoly over traffic traveling between St. Louis and East St. Louis. *Id.* at 311.

Similarly, in *Rogers Truck Line*, Congress passed a law lifting the limit on the number of common carrier authorities (which are essentially licenses to transport specific goods between two locations) available for transporting goods via truck. *Id.* at 109. This law resulted in a marked decrease in the resale or lease value of the authorities. *Id.* The plaintiffs, owners of authorities, alleged that they had a property interest in the authorities which was taken from them without just compensation. *Id.* The court rejected this argument, reasoning that the authorities did not give the plaintiffs the exclusive right to transport the designated goods over the designated routes, nor did the authorities give plaintiffs a constitutionally protected freedom from competition. *Id.* at 110-111. In this case, the Court finds that the license holders do not have a property interest in the value of the taxicab vehicle license on the secondary market because the issuance of the license does not entitle them to that value, nor does it provide for its legal protection. The license allows its holders to drive a taxi in the City. It does not guarantee that the City would indefinitely limit the number of taxi licenses issued. Even under the former ordinance, the City was required to conduct a hearing at least every 24 months to determine whether "public convenience and necessity" warranted additional licenses. (Compl. Ex. E at fmr. sec. 341.270(a)). Furthermore, the City, as a law-making entity, is free to amend ordinances as it sees fit. Like the trucking authority holders in the *Rogers Truck Line* case, the taxicab vehicle license holders do not have a constitutionally protected freedom from competition. Counts Two and Four are premised on the

argument that the taxicab vehicle license holders have a protectable property interest in the value of their licenses on the secondary market. In Count Two, Plaintiff alleges that the license holders were deprived of their property without just compensation, in violation of the Fifth Amendment. In Count Four, Plaintiff alleges that the City's actions that resulted in the license holders being deprived of the value of their licenses on the secondary market constituted a regulatory taking, in violation of the Fifth Amendment. Because the Court holds that the license holders do not have a property interest in the value of the licenses on the secondary market, it dismisses Counts Two and Four.

B. The Due Process Claim Fails (Count One)

In Count One, Plaintiff alleges that the license holders were deprived of their licenses without due process of law, in violation of the Fourteenth Amendment. (Compl. ¶ 43.) This claim must be dismissed because the City's amended ordinance did not deprive Plaintiffs of their licenses. Under the amended ordinance, the City increased the number of licenses available but did not revoke any licenses that were already issued. (*See* Compl. Ex. D and E.) Count One also alleges that the Plaintiff's members were deprived of their property without just compensation. (Compl. ¶ 48.) The Plaintiff makes this allegation more fully in Count Two and the Court addressed this takings claim in Section A of this Report and Recommendation.

C. Plaintiff does not have standing to bring its unconstitutional exaction claim (Count Three)

The United States Supreme Court held that the "irreducible constitutional minimum" of standing requires that *the plaintiff* have suffered an "injury in fact." *Bennett v. Spear*, 520 U.S. 154, 167 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (emphasis added).

Plaintiff alleges in Count Four of the Complaint that the wheelchair accessibility and the fuel efficiency requirements are an "unconstitutional exaction." (Compl. ¶ 83.) However, these requirements are mandated on *licensed service companies*, not on taxicab license holders. In the Complaint, Plaintiff identifies its members as individuals who hold "fully-transferable City of Minneapolis taxicab licenses." (Compl. ¶ 2.) Plaintiff does not allege that any of the license holders in the Coalition also holds a service company license and therefore lacks standing to bring the claim.

D. The Equal Protection Claim Fails (Count Five)

Plaintiff alleges that the City relaxed its licensing quota only to benefit "the Hispanic Community," in violation of the Equal Protection clause of the Minnesota Constitution, Minn. Constit. art 1, § 2. (Compl. ¶ 99.) Under Minnesota law, "[i]f a constitutional challenge involves neither a suspect classification nor a fundamental right, we review the challenge using a rational basis standard

under both the state and federal constitutions." *Gluba ex rel. Gluba v. Bitzan & Orhen Masonry*, 735 N.W.2d 713, 719 (Minn. 2007). Under rational basis review, the court determines "whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose." *Id.* at 721 (quoting *Kolton v. County of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002)).

The rational basis standard under Minnesota law is "higher" than that applied under federal law. "The key distinction between the federal and Minnesota tests is that under the Minnesota test 'we have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires.'" *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) (quoting *State v. Russell,* 477 N.W.2d 886, 889 (Minn. 1991)).

The law in this case is neutral on its face; that is, it does not involve a suspect classification and is therefore subject to rational basis scrutiny. The amended ordinance does not classify in any way on the basis of race. The ordinance provides that it will issue 45 new licenses each year until 2011 when it will lift the cap on the number of licenses. It also mandates fuel efficiency and handicap accessibility standards. The law does not make any classification at all. The City has set out a list of factors to consider in issuing the 45 licenses each year until 2011 when it will lift the cap.

Plaintiff has failed to allege that the City's amendment of the ordinance had no legitimate purpose. In fact, Plaintiff's complaint includes the City's list of reasons for passing the amendment, a number of which undoubtedly qualify as a legitimate government purpose. In paragraph 35 of the Complaint, Plaintiffs allege that a City Staff member stated the City's reasons for passing the ordinance, which included pursuing a policy that promotes "environmental stability" and better serves "disabled" individuals and "non-English-speaking populations." Because Plaintiff has not alleged that the City provided no legitimate purpose for amending the ordinance, its equal protection claim must fail.

This claim is not analyzed under strict scrutiny because Plaintiff has failed to allege that the law has a racially discriminatory impact. *See State v. Russell*, 477 N.W.2d 866, 888 n.2 (Minn. 1991) (under Minnesota law, to invoke strict scrutiny in an equal protection case, a plaintiff must establish discriminatory impact and show that the legislation was enacted with the purpose to effect a discriminatory impact or was enacted with indifference to the discriminatory impact). Here Plaintiff does not properly allege a racially discriminatory impact. Plaintiff alleges only that members of the Coalition "are themselves in many cases members of immigrant and minority groups." (Compl. ¶ 101.) This language does not allege that the new ordinance has had a racially discriminatory impact on any particular racial or ethnic group.

IV. RECOMMENDATION

Based upon all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED** that Intervenor's Motion to Dismiss be **GRANTED** [##25 & 30].

DATED: October 26, 2007 s/ *Franklin L. Noel*
FRANKLIN L. NOEL
United States Magistrate Judge

APPENDIX B: District Court's decision.

Minneapolis Taxi Owners Coalition, Inc. v. City of Minneapolis And A New Star Limousine and Taxi Service, Intervenor

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

December 18, 2007, Decided
December 19, 2007, Filed

ORDER

Plaintiff objects to the Report and Recommendation, issued October 26, 2007, by the Honorable Franklin L. Noel, United States Magistrate Judge. The Magistrate recommended granting Intervenor's motions to dismiss.

Based upon a de novo review of the record herein, the Court adopts the Magistrate's Report and Recommendation. Accordingly, Intervenor's motions to dismiss [Docket Nos. 25 and 30] are granted.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 18th, 2007

JAMES M. ROSENBAUM

United States Chief District Judge

APPENDIX C: Court of Appeals' decision.

Minneapolis Taxi Owners Coalition, Inc., Plaintiff-Appellant, v. City of Minneapolis, Defendant-Appellee, A New Star Limousine and Taxi Service, Intervenor-Appellee.

No. 08-1239 [572 F.3d 502]

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

November 13, 2008, Submitted
July 14, 2009, Filed

MELLOY, Circuit Judge.

In 2006, the City of Minneapolis (the "City") amended its taxicab ordinance to uncap the number of transferable taxicab licenses it issues, thereby opening a previously restricted market. The Minneapolis Taxi Owners Coalition (the "Coalition"), a group comprising holders of approximately seventy-five transferable taxicab licenses, sued the City, asserting federal and state constitutional violations, including violations of the Coalition's members' rights to just compensation and due process. Before trial, A New Star Limousine and Taxi Service ("New Star") intervened and filed a motion to dismiss for failure to state a claim. The district court 1 granted the motion and dismissed the case. The Coalition appeals. We affirm.

FOOTNOTES

1 The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota, adopting the Report and Recommendation of the Honorable Franklin L. Noel, United States Magistrate Judge for the District of Minnesota.

I.

The members of the Coalition hold transferable taxicab licenses issued by the City. Although originally purchased from the City for a relatively small fee (roughly $ 500), the transferable licenses sold on the secondary market for as much as $ 19,000 to $ 25,000. The City required administrative approval of all such license transfers, but it routinely granted the required approval.

Before the enactment of the ordinance amendments at issue, 341.270(a) of the Minneapolis Code of Ordinances required that the city council conduct a hearing at least once every twenty-four months "to consider whether public convenience and necessity warrant additional licenses." Minneapolis, Minn., Code of Ordinances tit. 13, art. II, ch. 341, § 341.270 (1995) (repealed 2006). In determining whether additional licenses were warranted, section 341.270(a) required the city council to consider:

The level and quality of service being provided by existing taxicab operators; whether additional competition would improve the level and quality of service or the degree of innovation in delivery of services; the impact upon the safety of vehicular and

pedestrian traffic; the impact on traffic congestion and pollution; the available taxicab stand capacity; the public need and demand for service; the impact on existing taxicab operators; and such other factors as the city council may deem relevant.

Id. A designated city council committee held open "public convenience and necessity" hearings on May 17, 2006, and June 7, 2006, to gather relevant information. Evidence presented at the hearings included general testimony both in favor of and against issuance of additional licenses; testimony that Coalition members would suffer an economic loss by such an increase; evidence that there was inadequate business for current taxicab operators; evidence of complaints regarding the level and quality of current service; economist testimony that removing the cap on licenses would increase jobs and the level of service provided; testimony that there was an untapped market for bilingual drivers, particularly for the Hispanic community; evidence that the number of wheelchair-accessible vehicles may have been insufficient; and evidence that a number of taxicabs were operating without licenses.

After the hearing, the City's Department of Licenses and Consumer Services Division submitted a "follow-up document" to the committee, stating that there was insufficient availability of taxicabs, especially wheelchair-accessible taxicabs and, during peak hours, taxicabs generally. The submission discussed two possible plans. "Plan A" did not increase the number of licenses, with the advantage that

current license holders would retain substantial value in their licenses. "Plan B" increased the number of licenses by forty-five every year until 2010, when the cap would be completely lifted. This plan required that new "licensed service companies" dedicate at least 10% of their fleets to wheelchair-accessible vehicles and at least 10% to "alternative-fuel and/or fuel-efficient vehicles." Plan B also required that existing licensed service companies dedicate at least 5% of their fleets to wheelchair-accessible vehicles and at least 5% to alternative-fuel [**5] and/or fuel-efficient vehicles by 2007, with the minimums increased to 10% by 2008. Plan B's perceived advantages included spurring better-quality service through the use of increased numbers of wheelchair-accessible vehicles and fuel-efficient vehicles. Its acknowledged disadvantages included the likely diminishing of the "monetary value" of existing taxicab licenses "to zero."

The committee recommended to the City that it increase the number of taxicab licenses pursuant to Plan B:

The Committee, upon weighing the received evidence and while recognizing that the issuance of additional licenses could likely produce a negative initial impact on existing operators, finds that such prospective impact is outweighed by the potential to (1) improve the level and quality of taxicab service to citizens and visitors in Minneapolis through a more open and free market structure has been accomplished in other jurisdictions, thereby positioning Minneapolis as a more viable destination for

entertainment, business, convention and other beneficial economic pursuits, and (2) pursue innovations in delivery of taxicab service in the areas of environmental sustainability while addressing underserved communities including the disabled, bilingual and non-English speaking populations.

In October 2006, the City revised the city ordinance code to lift the cap on licenses per Plan B. See Minneapolis, Minn., Code of Ordinances tit. 13, art. II, ch. 341 (2006).

In March 2007, the Coalition sued the City in Minnesota state court, arguing that the new ordinance reduced the value of the existing licenses to zero. Relying on the U.S. and Minnesota Constitutions, the Coalition claimed that (1) the City deprived Coalition members of their property interests without just compensation; (2) the City deprived Coalition members of their business licenses without due process; (3) the wheelchair-accessibility and fuel-efficiency requirements constituted an unconstitutional exaction; and (4) Coalition members were denied equal protection because the ordinance was amended, in part, to better serve the Hispanic community.

The City removed the case to the district court because the complaint asserted federal constitutional claims. See 28 U.S.C. § 1441(c). In May 2007, New Star moved to intervene, and the district court granted the motion. In June 2007, New Star moved to dismiss the Coalition's complaint under Federal Rule of Civil Procedure Rule 12(b)(6) for failure to state a claim.

In October 2007, a magistrate judge recommended granting the motion to dismiss, concluding that (1) Coalition members did not have a protectable property interest in the secondary-market value of their licenses and that therefore the Coalition had no takings claim; (2) the Coalition's due process claim similarly failed because the City did not deprive Coalition members of any property; (3) the Coalition did not have standing to bring an unconstitutional-exaction claim based on the taxicab fleet requirements because the requirements applied to licensed service companies, not taxicab license holders; and (4) the equal protection claim failed because the ordinance survived "rational basis" scrutiny. In December 2007, the district court adopted the magistrate judge's recommendation and granted New Star's motion to dismiss. The Coalition appeals and repeats its takings, due process, and unconstitutional-exaction arguments before this court. [2]

FOOTNOTES

2 The Coalition does not pursue its equal protection claim on appeal, and that claim is therefore waived. Fair v. Norris, 480 F.3d 865, 869 (8th Cir. 2007). The inclusion of a footnote hinting at a request for additional discovery to support unalleged facts based on "at least a suspicion" of improper motives is inadequate to preserve the claim. Fed. R. App. P. 28(a)(9)(A) (requiring an appellant's brief to "contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

II.

We review de novo the grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6), accepting the facts as alleged in the complaint and granting all reasonable inferences in favor of the Coalition as the non-moving party. Neighborhood Enters., Inc. v. City of St. Louis, 540 F.3d 882, 884--85 (8th Cir. 2008).

A. Takings

The Coalition argues that removing the cap on the number of taxicab licenses is a taking of private property requiring just compensation under the Fifth Amendment to the U.S. Constitution. See U.S. Const. amend V. 3 The Coalition does not contend that the City revoked or somehow vitiated existing licenses or that opening the market destroyed the ability of the license holders to use their licenses to do business. The Coalition only contends--and the City does [**9] not contest--that removing the cap on the number of licenses destroyed the market value of the licenses. The elimination of the market value of the taxicab licenses, however, can be considered a taking under the Fifth Amendment only if there is a protected property interest in that market value. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Property interests "are created and their dimensions are defined by existing rules or understandings." Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

FOOTNOTES

3 We note that, although the Coalition argued both state and federal takings claims before the district court, it argues only its federal claim on appeal.

Those "existing rules" include relevant state law, id., and the Coalition relies on several Minnesota cases to argue that the holder of a license does have a property interest in that license. See State v. Saugen, 283 Minn. 402, 169 N.W.2d 37, 41 (Minn. 1969) (holding that "[a liquor-]license was assignable and transferable and as such can be construed as a property right rather than a privilege"); CUP Foods, Inc. v. City of Minneapolis, 633 N.W.2d 557, 562--63 (Minn. Ct. App. 2001) (finding a property interest in a realtor's business license); Bird v. Dep't of Pub. Safety, 375 N.W.2d 36, 42--43 (Minn. Ct. App 1985) (finding a property interest in an automobile dealer's license); see also Boonstra v. City of Chicago, 214 Ill. App. 3d 379, 574 N.E.2d 689, 694, 158 Ill. Dec. 576 (Ill. App. Ct. 1991) (holding that "a taxicab license and its assignability is a constitutionally protected property interest"). 4 CUP Foods and Bird are inapposite to the Coalition's claims, however, because both cases address the complete revocation of the licenses at issue. See CUP Foods, 633 N.W.2d at 562; Bird, 375 N.W.2d at 39. Saugen is similarly inapplicable.

FOOTNOTES

4 In Boonstra, the Illinois Appellate Court determined that by "summarily precluding those persons already

having an assignable interest in taxicab licenses from being able to assign their property interests, the City of Chicago's action constituted a taking of property without due process and without just compensation." 574 N.E.2d at 695. In effect, "the City of Chicago created for its citizens a public market place for the assignment of its taxicab licenses. Thus, the taxicab licenses in reality became more than just mere personal permits . . . ." Id. at 694. In Boonstra, the City of Chicago totally prohibited all assignment of the licenses, and given the death of the license holder, was akin to a revocation. Id. at 691--92. In the present case, however, licensees are still able to use their licenses and assign their licenses to others. The economic effect is harder to distinguish: under either regulation, licensees are no longer able to transfer their licenses for the significant sums of money they once were. To the extent Boonstra would establish a compensable property right in a regulation-created market value, then, we must decline the invitation to follow the decision of the Illinois Appellate Court. See Movers Warehouse, Inc. v. City of Little Canada, 71 F.3d 716, 719--20 (8th Cir. 1995) ("[T]he property right must arise as a matter of state law; most of the cases cited by [the plaintiff] do not deal with Minnesota law and are thus inapplicable.").

In Saugen, the Supreme Court of Minnesota considered the property right in a liquor license to include the going-concern value of the business where the state had taken the property on which the licensee's business had been located and the licensee was unable to transfer his license to a new location. Saugen, 169

N.W.2d at 39. The court noted that the state's actions had "effectively destroyed [the licence holder's] valid and unrevoked ability to engage in the liquor business" and that there was "no problem [in that case] with a speculated [going-concern] loss because the going-concern value ha[d] been stipulated." Id. at 46. In the present case, however, the Coalition does not argue that its licensee--members are no longer able to continue their businesses as operating enterprises. Here, the licensed taxicab businesses "will continue to operate as a going concern, even if profits are somewhat reduced." City of Minneapolis v. Schutt, 256 N.W.2d 260, 263 (Minn. 1977). Saugen cannot be interpreted to establish a property interest different from the interest at issue in that case. Even were we to construe the Coalition's argument as claiming that the market value of a license was representative of the going-concern value of the licensed business, the market value of the license--especially given the existence of the artificially restricted market--was, at best, an incomplete and imperfect assessment of that going-concern value. A property interest cannot be extended to the going-concern value of a licensed business where that going-concern value is merely speculative. Saugen, 169 N.W.2d at 46; see Schutt, 256 N.W.2d at 262--63 (limiting Saugen to its facts). The Coalition is unable to point to any Minnesota law establishing the property interest the Coalition argues has been taken.

The Coalition also relies on the Federal Circuit's decision in Members of the Peanut Quota Holders Ass'n for the proposition that a license to participate in

a controlled market is a property interest in the restricted nature of that market, such that the City cannot, without just compensation, reduce the market value of the taxicab licenses by increasing their number. See Members of the Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323, 1334 (Fed. Cir. 2005) ("A property right accrues when the government has seen fit to take a limited resource and secure it for the benefit of an individual or a predetermined group of individuals."). The Peanut Quota Holders decision distinguished between peanut quota allotments, which include a property right, and certain fishing licenses, which do not. Id. at 1333--34. The quotas "guaranteed a minimum price," and "[o]nce a particular quota had been awarded, the granting of further quotas did not [**14] dilute that allotment." Id. at 1334. The taxicab licensees, with no equivalent guaranteed minimum, cannot be said to share this concreteness of value. Even before the ordinance amendment, the taxicab licenses were similar to the fishing licenses in Peanut Quota Holders in that "[e]ach additional license dilute[d] the value of the previously issued licenses" because the limited resource was subject to increased competition with each additional license. Id. at 1333--34; see Jackson Sawmill Co., Inc. v. United States, 580 F.2d 302, 306--07 (8th Cir. 1978) ("[T]here is no property right or vested interest in a continuing flow of traffic."). The taxicab licenses themselves do not carry an inherent property interest guaranteeing the economic benefits of using the taxicab license.

More broadly, the "existing rules or understandings" that define the dimensions of the property interest

indicate that the taxicab licenses were not understood to provide an unalterable monopoly over the Minneapolis taxicab market. See Rogers Truck Line, Inc. v. United States, 14 Cl. Ct. 108, 111 (1987) (holding that a commercial-carrier license "did not give plaintiffs a constitutionally protected freedom from competition"). Property ownership is not without inherent limitation. In the case of real property, compensation is not required where the limitation already "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Lucas, 505 U.S. at 1029. "And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . . ." Id. at 1027--28. This inherent limitation is especially present in highly regulated markets. Mitchell Arms, Inc. v. United States, 7 F.3d 212, 216 (Fed. Cir. 1993) (stating that an enforceable property interest "cannot arise in an area voluntarily entered into and one which, from the start, is subject to pervasive Government control," because the government's retention of discretion over that area means that the individual "cannot be said to possess the right to exclude" (internal quotations, citation, and emphasis omitted)). The general expectation of regulatory change is no less present where the value of the property interest is derived from the regulation itself. See Peanut Quota Holders, 421 F.3d at 1334 (stating that "[quota holders] have no legally protected right against the government's making changes in the

underlying program and no right to compensation for the loss in value resulting from those changes" and that "[q]uotas are property, but they are a form of property that is subject to alteration or elimination by changes in the government program that gave them value").

The "public convenience and necessity" hearings required by the ordinance do not change the understanding that the license to participate in the highly regulated taxicab market is subject to regulatory change. Contrary to the Coalition's contention, the City retained the discretion to alter the number of licenses, and "[s]o long as the government retains the discretion to determine the total number of licenses issued, the number of market entrants is indeterminate." Id. The ordinance expressly contemplated increases in the number of taxicab licenses. It did not limit the City's discretion to issue additional licenses. In determining whether to issue additional licenses, the ordinance allowed the City to consider any factors it deemed relevant, and it did not establish any minimum standards that would dictate the City's decision either for or against the issuance of additional licenses.

The Coalition does not allege a taking of the taxicab licenses or of the ability to engage in the licensed activity; rather, the Coalition's takings claim is limited to "the ability to realize an expectation in the ultimate market disposition of the [licenses]." Mitchell Arms, 7 F.3d at 217. "This 'collateral interest' incident to . . . ownership . . . is not property protected by the Fifth

Amendment." Id. Even if there is a property interest in a particular license, "a takings claim cannot be supported by asserting ownership in a property interest that is different and more expansive than the one actually possessed." Rogers, 14 Cl. Ct. at 114. We therefore hold that any property interest that the taxicab-license holders' may possess does not extend to the market value of the taxicab licenses derived through the closed nature of the City's taxicab market. Without such a property interest, their takings claim necessarily fails.

B. Due Process

The Coalition also argues that the City's new ordinance violates its members' due process rights under the Fourteenth Amendment to the U.S. Constitution and Article I of the Minnesota Constitution. See U.S. Const. amend. XIV; Minn. Const., Art. I, § 7. The due process protection provided under the Minnesota Constitution is "identical" to the protection provided by the U.S. Constitution. Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 453 (Minn. 1988).

"The possession of a protected life, liberty, or property interest is a condition precedent to invoking the government's obligation to provide due process of law." Stauch v. City of Columbia Heights, 212 F.3d 425, 429 (8th Cir. 2000). A municipal ordinance may create a protected property interest "by establishing procedural requirements that impose substantive limitations on the exercise of official discretion." Id. at 429--30

(finding a property interest in the renewal of a rental license derived from a municipal ordinance licensing scheme that required renewal be granted upon satisfaction of objective criteria). Here, however, the ordinance's hearing requirement does not curtail the City's discretion in such a way as to create a protected property interest for the purposes of due process. See Movers Warehouse Inc. v. City of Little Canada, 71 F.3d 716, 720 (8th Cir. 1995) finding no property interest in the renewal of a bingo-hall license where "state law place[d] no substantive limitations on the discretion of the licensing authority").

As discussed above, the taxicab licensees do not have protected property interests in the market value of their licenses. As such, the ordinance does not implicate the holders' property interests or, it follows, their due process rights.

C. Unconstitutional Exaction

The Coalition further argues that the amended ordinance's application of new wheelchair-accessibility and fuel-efficiency standards is an unconstitutional exaction. See Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (holding that the government could not, without just compensation, condition the approval of a building permit on the grant of a public easement when the condition had no essential nexus to the government's interest in the development). The ordinance provision requiring wheelchair-accessible and alternative-fuel vehicles, however, applies to licensed service companies rather

than to individual licensees. In its complaint, the Coalition states that its members hold fully transferrable taxicab licenses; the Coalition does not allege that any of its members are, or are affiliated with, licensed service companies.

The Coalition now argues that because licensed service companies are necessarily made up of, and closely related to, individual taxicab licensees, the licensees will inevitably be injured by the change in the ordinance and therefore have standing, but the Coalition's deductive reasoning can take its argument only so far. While it may be true that an ordinance applied to licensed service companies necessarily affects the license holders affiliated with those companies, the Coalition has not alleged that any of its member--licensees are in fact affiliated with any licensed service company.

Because the Coalition's complaint does not allege a relationship between its member--licensees and the affected licensed service companies, we agree with the district court that the Coalition cannot show "injury in fact" and therefore does not have standing with respect to its unconstitutional-exaction claim. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

III.

For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX D: Court of Appeals' decision denying the Petition for Rehearing.

No. 08-1239 [572 F.3d 502]

Minneapolis Taxi Owners Coalition, Inc., Appellant, v. City of Minneapolis and A New Star Limousine and Taxi Service, Appellees.

Appeal from U.S. District Court for the District of Minnesota – Minneapolis

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 17, 2009.

Order entered at the direction of the Court.
Clerk, US Court of Appeals, Eighth Circuit
Michael E. Gans